

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 28, 2001
at 3:20 P.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: Sen. Ric Holden (R)

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted:
Executive Action: HB 66, HB 165, HB 637

EXECUTIVE ACTION ON HB 66

SEN. MIKE HALLIGAN explained that the amendments were worked out so the legislation wouldn't cost money. The sponsor of the bill met with the Director of Legislative Services and the Code Commissioner to work out an agreement where the departments would recommend to the commission the various laws that potentially needed to be updated. The commission would only review their recommendations. It required the agencies to draft legislation then submit it to the Code Commissioner. That person would review the commission's information to possibly present bills to the legislature. The interim committees would be required to present their suggestions by June 30, 2002. He mentioned the sponsor was trying diligently to update the code without cost.

Motion/Vote: **SEN. HALLIGAN** moved **HB 66 be reconsidered. Motion carried 7-1 with Grimes voting no.**

Motion: **SEN. HALLIGAN** moved that **AMENDMENTS HB006602.ALM BE ADOPTED.**

Discussion:

SEN. DUANE GRIMES felt the Code Commissioner updated the code, and it should be up to the legislature. He didn't think there was anything that prevented the agencies from bringing these things forward anyway. He didn't want to not see the codes cleaned up, but the way to do it was with some legislative oversight. He didn't want the next session to have to struggle through a huge bill that would be nearly impossible to decipher.

Vote: Motion to adopt amendments HB006602.alm carried 8-0.

Motion: **SEN. HALLIGAN** moved that **HB 66 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. GRIMES didn't want to delegate the legislative responsibility of keeping the code to the agencies. It was the legislature's purview, not the agencies. He trusted the staffers to keep notes on what was illogical and it was their domain.

SEN. HALLIGAN said **REP. CHRISTOPHER HARRIS** had worked hard and it was a policy decision.

Substitute Motion/Vote: **SEN. GRIMES** made a substitute motion that **HB 66 BE TABLED. Substitute motion failed 3-6 with Bishop, Grimes, and Holden voting aye.**

Vote: Motion that HB 66 be concurred in as amended carried 6-3 with Bishop, Grimes, and Holden voting no. SEN. HALLIGAN would carry the bill on the Senate Floor.

EXECUTIVE ACTION ON HB 165

CHAIRMAN LORENTS GROSFIELD said there had been some clean-up to the amendments provided at an earlier meeting, this new version was HB016506.av1, **EXHIBIT(jus70b01)**. They struck everything after the enacting clause in the bill and redid it. Most of the original bill was still in the amendments, but it was rearranged and cleaned-up to cover the inconsistencies. He said that people representing different interests were present to field any questions. He noted the amendments, specifically page 8, didn't apply to the Anzick Site. **George Ochenski** provided a handout listing the exempted items, **EXHIBIT(jus70b02)**. **CHAIRMAN GROSFIELD** explained that the parenthetical phrase under new section 13 provided a code: 24 meant Montana, PA meant Park County, and 506 referred to an archaeological map reference pinpointing the Anzick site. Also in that phrase, the word "collection" should be changed to "site". This exception only applied to lithic material and artifacts, not to human skeletal remains. He asked **Valencia Lane** to further explain.

Valencia Lane, Legislative Staffer, pointed out that one version of this same amendment would have limited the exclusion to materials already taken from the site. That was removed, but not in the title. The title had now been corrected.

CHAIRMAN GROSFIELD reminded the committee that this bill referred to events prior to 1991, before the Montana Human Skeletal Remains and Burial Site Protection Act. It was effective July 1, 1991. The Protection Act protected anything found since 1991, including Anzick. He asked **Mr. Ochenski** to respond.

George Ochenski, Confederated Salish and Kootenai Tribes, referred to the first amendment. The Tribes wanted to add "on or before July 1, 1991" when the word "previously" was struck.

CHAIRMAN GROSFIELD agreed with that clarification.

SEN. DUANE GRIMES asked to have the Historical Society respond and give a brief description of the Anzick site.

Arnie Olsen, Director Montana Historical Society, said the site was discovered accidentally in the late 60s by private landowners in the Livingston/Wilsall area. The collection was close to 12,000 years old. Most of the artifacts were stone points and that sort of thing, including tools. They were on loan to the

Historical Society since 1988. Three-fourths of the collection had been removed by the landowners because of concern over this legislation.

SEN. GRIMES further asked that without this bill and before it became a possibility, if additional historical/archaeological artifacts were found, would they have fallen under the current bills or were they all excluded because it was a pre-existing site.

Mr. Olsen replied anything found since 1991 would fall under the Burial Protection Act. This legislation referred to items found prior to that date.

SEN. GROSFIELD asked **Ms. Lane** to give an update of what the new bill did. He said private lands or private collections were still in the bill. However, the hearing process was tightened to make better sense. The relationship between the hearings officer and the board who made decisions had been clarified.

Ms. Lane reminded the committee that a "gray bill" had been proposed by **SEN. GROSFIELD**. The amendments were basically that bill with instruction format. To make things easier, they struck everything after the enacting clause and began from scratch. She didn't think there were a lot of substantive changes. Private lands again were included in the bill. The private holders of remains and objects were put in as originally drafted. The "gray bill" took them out. Section 4 of the original bill was long and confusing. Therefore, it had been broken up into sections 4-10, and perhaps 12. This clarified it and made it easier to read. In doing that, she discovered old section 4 was confusing the rules and duties of the hearings examiners and the board. By breaking it up into sections she modeled the rules and duties of each according to MAPA, and it was referenced in the bill. Therefore hearings examiners conducted the hearings, provided findings based on the evidence, then made recommendations to the board. This allowed the board to make the orders. Section 6 referred to the hearings examiner. Section 8 referred to the board. Section 9 referred to appeals. Section 5 was not intended to be a change, but simply a clarification of the original bill. Substantive changes were not intended with these amendments. The amendments clarified and addressed suggestions from the chairman. She requested that any further changes be brought forth while everyone was present and looking at the same version.

SEN. MIKE HALLIGAN asked about multiple claims. He wondered if anyone could make a claim.

Ms. Lane said she broke that part up because originally it was one long sentence. It never indicated that someone could intervene, nor where the requests would come from. She suggested asking the drafter of the bill.

SEN. HALLIGAN wondered if there was an opportunity for another tribe to express interest if they also wanted to be involved with a claim.

CHAIRMAN GROSFIELD said sub (2) would be resolved by the board. Therefore, multiple claimants would go before the board and the board would rule on the merits of each claim. He asked **Ms. Bond** to respond.

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Sarah Bond, MT Office Attorney General, said she assisted in the drafting of the bill. She noted that some things weren't clearly defined. The board did have rule-making authority. For someone to intervene, they'd have to know that the proceeding was happening. She said the findings generally were kept quiet to avoid looting and curiosity seekers from invading what cultural leaders could consider sacred sites. If it was a water-rights hearing or something of that nature, the board could be required to publish notice that a claim had been filed. However, given the sensitive nature and the religious information involved, public notice might not be a good idea. As a practical matter, the board would have notice of the claim and tribal representatives from each area were on the board. She suggested a tribe should find out about proceedings through the grapevine. Other details would be worked out by the board through rules and the established rule-making authority. Generally, since all tribes were represented on the board, they would know about any claims and it should be left to the board to decide whether to give public notice.

SEN. HALLIGAN asked about a "friend of the court" sort of thing to be able to assist the board in their decision.

Ms. Bond responded the assumption was that the tribes and all the people in the community (museums and burial site people) would know what was going on and could intervene. She noted the board members all had expertise in the area and would be able to get the necessary information.

CHAIRMAN GROSFIELD suggested that section 12 could include "resolving disputes of multiple claimants". He offered that as a friendly amendment. He also suggested adding something to clarify that hearings could not be heard until rules were in place. The rules should address minimum criteria for determining lineal

descent, cultural affiliation, standards of evidence, and standards of proof. This would give the board guidance as well as the kinds of things they should put into their rule-making. That amendment would also fall under section 12. He referred to section 9, the appeals. Instead of having the losing party pay the costs, make it discretionary for the judge to determine who would pay to make it fair. He asked for comment.

Mr. Ochenski said it was OK with the tribe.

CHAIRMAN GROSFIELD asked for other issues. He acknowledged that it would go into conference committee, so it wouldn't have to be perfect.

Motion: **SEN. DOHERTY** moved that **AMENDMENTS HB016506.AVL BE ADOPTED AS AMENDED.**

Discussion:

Mr. Ochenski mentioned that everyone agreed to remove the words "culturally affiliated" in section 2, sub (1)(b).

CHAIRMAN GROSFIELD clarified that it was actually section 2, sub (1)(c) on page 2. He accepted the amendment.

SEN. WALT McNUTT questioned that it was in sub (c), not (b).

CHAIRMAN GROSFIELD said it was sub (c) where "culturally affiliated" first appeared.

SEN. JERRY O'NEIL asked why not in sub (b) also.

CHAIRMAN GROSFIELD replied it was a different issue. He asked if **Ms. Bond's** issues had been addressed.

Ms. Bond said yes, except section 6 which could be read to say the hearings officer could conduct a hearing without being asked to do so. She read it as steps in a process. If it could be possible to read it the other way, then inserting "upon such a request" could be added to clarify.

CHAIRMAN GROSFIELD agreed because he didn't want a hearings examiner requesting expensive testing without being requested to do so. He felt it was a good idea.

Mr. Olsen offered another consideration. Under section 5, the wording indicated under 1(a) and 2(b), a claim could be filed for human skeletal remains "believed" . . . He wanted that word struck because people either had possession or they didn't. They

were concerned about claims based on rumor or hearsay. They wanted substantial evidence, not hearsay in order to protect people.

CHAIRMAN GROSFIELD asked **Ms. Bond** to respond to that suggestion.

Ms. Bond said from a drafting standpoint, she wasn't sure it mattered. She didn't read it as preventing someone from making a claim against the museum even if it wasn't listed in their inventory. She thought the suggestion was fine.

CHAIRMAN GROSFIELD agreed. By retaining the language, it might give rise to claims **Mr. Olsen** was concerned about. He requested it to be changed in those two places. He asked **Ms. Lane** to clarify the changes.

Ms. Lane did so. The word "previously" stayed in the title. Section 2, (2) (c) removed the first occurrence of "culturally affiliated". Section 5 (1) (a) struck "believed to have" and inserted "having". Section 5 (2) (b) struck "believed to be". Section 6 (2) inserted, "Upon such a request," the hearings examiner. . . Section 9 inserted language that the court determine who paid the fees and the losing party sentence was struck. Section 12 would include procedures for resolving multiple claims and would establish that rules had to be in place as well as what the rules would address. Section 13 struck "collection" to insert "site" then added "on or before July 1, 1991".

Ms. Bond questioned if the intent was to make the title the same as section 13 language to include the date.

CHAIRMAN GROSFIELD said "previously" would remain in the title without the date.

Ms. Lane said the date could be inserted into the title.

Ms. Bond said it made sense to put it in both places.

CHAIRMAN GROSFIELD said the date would be added to the title as well.

Vote: Motion to adopt HB016506.av1 as amended carried 8-0, SEN. HOLDEN excused.

Motion: SEN. O'NEIL moved that SECTION 13 OF HB 165 BE AMENDED to include a time frame and private possession.

Discussion:

CHAIRMAN GROSFIELD said it would become subsection 2 of section 13.

SEN. STEVE DOHERTY opposed the amendment because the intent was that the material wasn't abandoned, it wasn't found. It was placed for a purpose. He questioned placing a date on it because it could get into battles of proof.

CHAIRMAN GROSFIELD said this bill applied to pre-1991. As a practical matter, it would be very hard to establish a relationship to funerary objects, unless it was found basically in a grave with human skeletal remains. The more aged, the more difficult it would become. He leaned away from the motion. Through carbon dating, it was accurate within 60 years.

SEN. GERALD PEASE commented that Native Americans weren't the only ones here, there were non-Indian settlers as well. It was possible to determine where ancestry remains came from.

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He asked **REP. GUTSCHE** if other states were presenting similar legislation.

REP. GAIL GUTSCHE said five states had repatriation laws that weren't the same, but similar.

SEN. PEASE asked if they surrounded Montana, the Northwest.

REP. GUTSCHE replied they weren't necessarily surrounding. They were California, Hawaii, Kansas, Nebraska, and Arizona.

CHAIRMAN GROSFIELD said some states had repatriation laws, but he wasn't sure any of them treated funerary objects in the same way as this legislation. As far as skeletal remains, they could be similar.

Ms. Bond said other states required repatriation of funerary objects and the limitation derived from the property ownership.

Mr. Olsen said some states had similar burial acts, but they weren't aware of others applying it retroactively to things held in possession a long time like this legislation.

SEN. O'NEIL closed on his motion saying the bill didn't require proof that it was a funerary object, merely cultural affiliation.

CHAIRMAN GROSFIELD treated that as a question and answered it. He referred to page 3 that gave a definition of funerary objects.

This caused the burden of proof in a hearing. He also referred to the definition of a burial site within the bill. Therefore, this bill did not apply to just anything, but provided clear definition of the material.

SEN. O'NEIL withdrew his motion.

Motion/Vote: **SEN. DOHERTY** moved that **HB 165 BE CONCURRED IN AS AMENDED. Motion carried 8-1 with Holden voting no. SEN. GROSFIELD** would carry the bill on the floor.

EXECUTIVE ACTION ON HB 637

Motion: **SEN. HALLIGAN** moved **AMENDMENTS HB063701.asf.**

Discussion:

SEN. MIKE HALLIGAN said the amendments removed the appropriation and it would still have the corrections policy as well as the guidance they needed to establish the office of restorative justice.

SEN. DUANE GRIMES asked if the amendments could also include "or faith-based" where ever "community-based" occurred.

SEN. HALLIGAN didn't think it was a problem, but would prefer "including faith-based". The "or" seemed to give preference to one over the other. They didn't want that, but wanted them all included on the same level.

SEN. GRIMES said "including" was agreeable if the intent was clear to not require all faith-based to be linked to community-based. He didn't want them to always have to work together.

SEN. JERRY O'NEIL suggested a wording change to include "and" accountable.

SEN. HALLIGAN asked why that was different.

SEN. O'NEIL said sometimes it would be desired to punish someone as an example to society or some other reason rather than just holding a person accountable.

SEN. HALLIGAN said the purpose was to get away from that. He said the accountability, public safety, competency functions, and the victims were the four areas of restorative justice. He said punishment was a part of that, but it was called accountability. They were trying to get away from just punitive if there was a

way to build competency while the person was being held accountable. This allowed the person to build skills and self-esteem to make them not do it again. That was the whole purpose.

SEN. O'NEIL offered saying "and/or".

CHAIRMAN LORENTS GROSFIELD asked what the suggestion really meant.

SEN. O'NEIL stated how he wanted it written for **Ms. Lane**.

CHAIRMAN GROSFIELD said it would be considered a friendly amendment.

Vote: Motion to adopt amendments HB063701.asf as amended carried unanimously.

Motion: **SEN. DOHERTY** moved **AMENDMENTS TO HB 637 REGARDING FISCAL IMPACT BE ADOPTED**.

Discussion:

SEN. STEVE DOHERTY said they reduced the appropriation from \$400,000 to \$100,000. It no longer put federal funds received in the state special revenue account. The funds would be a budget amendment if they were received. He thought they were technical amendments.

Vote: Motion to adopt fiscal amendment to HB 637 carried unanimously.

Motion/Vote: **SEN. HALLIGAN** moved that **HB 637 BE CONCURRED IN AS AMENDED**. Motion carried unanimously.

ADJOURNMENT

Adjournment: 4:30 P.M.

SEN. LORENTS GROSFIELD, Chairman

ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT (jus70bad)